United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-6065

In The

United States Court of Appeals

For the Second Circuit

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P/S

CITY OF ROCHESTER AND GENESEE-FINGER LAKES REGIONAL PLANNING BOARD,

Plaintiffs-Appellants,

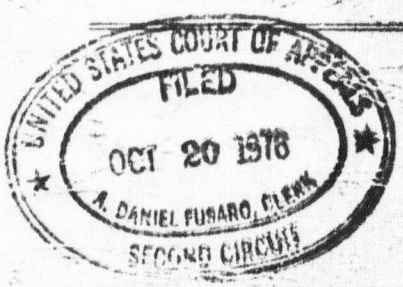
v.

UNITED STATES POSTAL SERVICE and BENJAMIN F. BAILAR, UNITED STATES POSTMASTER GENERAL,

Defendants-Appellees.

Appeal From The United States District Court For The Western District Of New York.

PETITION FOR REHEARING IN BANC BY UNITED STATES POSTAL SERVICE AND UNITED STATES POSTMASTER GENERAL



RICHARD J. ARCARA
United States Attorney for the
Western District of New York,
Attorney for Appellee,
233 U.S. Courthouse,
Rochester, New York 14614

GERALD J. HOULIHAN,
Assistant United States Attorney,
Of Counsel.

Daily Record Corporation
Rochester, New York

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Preliminary Statement

The United States Postal Service and the Postmaster General (USPS) respectfully petitions for a rehearing *in banc*, or in the alternative, for a rehearing of the decision of this Court (Oakes, Mansfield and Smith, J.J.) decided September 3, 1976.[1]

The decision reversed the District's Court's findings that the U.S.P.S. had fully complied with the National Environmental Policy Act (NEPA); that the plaintiffs failed to prove their allegations; that the claims alleged are not within the province of NEPA, that plaintiffs lacked standing and that plaintiffs were guilty of laches.

Reasons For The Petition

It is respectfully submitted that the decision sought to be reheard dangerously expands the scope of NEPA beyond the intent of Congress and further than any previous decision of the Second Circuit. In so doing, this holding is in direct conflict with decisions on the same issues in at least the Sixth Circuit and the District of Columbia Circuit.

The effect of this decision is to change the standard for review of agency determinations under NEPA; ignore a substantial record which was affirmed by the District Court, and impose an unreasonable burden on the U.S.P.S. by granting relief in excess of that even requested by the City of Rochester (City) or the Genesee-Finger Lakes Regional Planning Board (Planning Board).

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[1]By order dated September 17, 1976 the Appellee's time to petition for rehearing was extended to October 17, 1976.

On September 3, 1976, the U.S.P.S. project was 65% completed. The project was studied and alternatives considered in an exhaustive reviewable administrative record dating from 1968 through 1975 (App. 135-140; Ex. 87-447).[2] The District Court decision included extensive findings of fact and conclusions of law approving every aspect of the U.S.P.S. decision (App. 135-145).

Although plaintiffs knew of the decision of the U.S.P.S. to build the project as early as March, 1974, suit was not instituted until January 14, 1976 when the project was already 18% completed.

The Second Circuit Decision, written by Judge Oakes, was filed September 3, 1976.

The compelling factors of this case which demand review by the whole court are as follows:

1. The decision expands the scope of NEPA by effectively holding that social and economic factors are sufficient in and of themselves to trigger NEPA controls. This is contrary to prior Second Circuit decisions, and is in direct conflict with *Breckenridge v. Rumsfeld*, 537 F.2d, 864 (6th Cir. 1976) (This Circuit opinion expressly rejects the socio-economic argument under NEPA and in doing so relies specifically on Second Circuit decisions.) and *Maryland National Capitol Park v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973).

2. While the District Courts specifically found substantial delay (18 months to 2 years) on the part of the plaintiffs, as well as severe prejudice to the U.S.P.S. as a result, the practical effect of the appellate decision is to disregard laches entirely. Delay in using the new facility will effectively cost the U.S.P.S. approximately $6,000.00 per day.

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[2]All references to the Appendix will be abbreviated "App."; references to the Transcript will be abbreviated "Tr." and references to the Exhibit Book will be abbreviated "Ex.". Numerals appearing after each abbreviation refers to the relevant pages of each item.

3. The decision requires an EIS be prepared on the construction of the new mail facility (HMF) despite the fact that the allegations of the complaint, the testimony at trial, the documents submitted, the record on appeal and even the Appellant's brief are totally devoid of any claim, much less proof, of any environmental injury. The property is totally within an industrial zone, so zoned by the Town of Henrietta and in accord with all plans of the Appellant Planning Board. The Town of Henrietta declined to join in this suit, its *only* complaint being the loss of tax revenue.

4. Despite substantial findings of fact by the District Court, the appellate decision ignores completely Rule 52(a) of the Federal Rules of Civil Procedure, fails to make any determination that the findings of the District Court were "clearly erroneous" and clearly did not view the evidence in the light most favorable to the prevailing party.

5. The appellate decision mistakenly states that the U.S.P.S. negative determination was based solely on one document. This is *directly* contrary to undisputed testimony at trial, the documentary evidence, the findings of facts by the District Court, and the complete record on appeal.

6. The appellate decision orders studies of the impact on employees of transfer to the HMF, which studies were already completed, testified to at trial, submitted in documentary evidence and are part of the record on appeal.

7. The appellate decision, while recognizing there was no site downtown (the City's only demand prior to suit) goes on to impose an unreasonable burden on U.S.P.S. by requiring that the U.S.P.S. prepare an EIS by pretending a $12 million building, 65% completed, is not in existence and by prohibiting any effective use of the building until the lengthy procedures of preparing an EIS are followed.

8. The decision finds standing for both plaintiffs despite a contrary holding below and despite a failure of proof as to

"injury in fact" or that the claimed injury is to an interest sought to be protected by NEPA.

Because of the space limitations, the Government sincerely urges this Court to refer to the Government's brief on Appeal.

ARGUMENT

NEPA Considerations and Standing

The fundamental issue is whether sociological and economic injuries, even if proved, are sufficient in themselves to trigger the controls of NEPA.

The District Court, after trial, found that such injuries were not proved and held that socioeconomic injuries were insufficient to actuate the controls of NEPA (App. 145, 141).

The decision of the Court in this case holds in effect that socioeconomic injuries, alleged and not proved, are sufficient to actuate the controls of NEPA. The net effect is to expand NEPA: 1. far beyond what was clearly intended by Congress; 2. far beyond the previous decisions of this Circuit; 3. to a point where the Second Circuit is in direct conflict with specific decisions of at least the Sixth Circuit and the District of Columbia Circuit.

In *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976)[3] held that, although socioeconomic effects are not totally beyond the scope of NEPA, such interests, in and of themselves, are not sufficient to trigger NEPA processes. In reaching this decision, the Court relied heavily on Second Circuit decisions. *Id* at 866.

In *Maryland National Capital Park v. U.S.P.S.*, 487 F.2d 1029 (D.C. Cir. 1973) the Court said:

> We remain troubled, however, by indications that the main concern, the "overriding" issue of [plaintiff] is "social and economic" rather than "environmental".

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3 This case was decided subsequent to the argument of this appeal.

Furthermore, other courts in considering the "standing" issue of whether the claimed injury is within the zone of interests sought to be protected by NEPA, have uniformly denied standing where solely economic interests were asserted. *Churchhill Truck Lines, Inc. v. U.S.*, 533 F.2d 411 (8th Cir. 1976); *Gifford-Hill & Co. v. F.T.C.*, 523 F.2d 730 (D.C. Cir. 1975); *Clinton Community Hospital, Corp. v. Southern Maryland*, 374 F.Supp. 450, *aff'd. per curiam*, 510 F.2d 1037 (4th Cir. 1975); *Pizitz, Inc. v. Volpe*, 4 ERC 1195, *aff'd. per curiam*, 467 F.2d 208 (5th Cir. 1972).

The apparent expansion of NEPA by this decision should be considered in light of the admonition of Chief Justice Burger in *Aberdeen & Rockfish R. Co. v. SCRAP:*

> Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead Courts to exercise equitable powers loosely or casually whenever a claim of "environmental damage" is asserted. 409 U.S. at 1217 (1972)

Previous decisions of the Second Circuit have held that social and economic factors may be considered only when there existed a primary impact on the physical environment. See: *Chelsea Neighborhood Assns. v. U.S.P.S.*, 516 F.2d 378, 388 (2nd Cir. 1975); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2nd Cir. 1972) *cert. denied*, 409 U.S. 990 (1972). Also, *Minnesota Public Interest Research Group v. Butz*, 493 F.2d 1314, 1322 (8th Cir. 1974); *Maryland National Capital Park v. U.S.P.S.*, 487 F.2d 1029, 1037-38 (1973).

According to the complaint, the *only* pertinent allegation of injury to the city is that "such abandonment [of the MPO] may reasonably be expected to decrease employment opportunities in Rochester and to adversely affect the general economic and social vitality of the downtown area of Rochester." (App. 5). Not only did the plaintiffs fail to prove these allegations, but

they never even alleged any primary physical injury to the environment.

In enacting NEPA, Congress was concerned with the wholesale destruction of our nation's environmental resources. See, S. Rept. No. 91-926, 91st Cong., 1st Sess. 8-9 (1969). Thus, NEPA is focused on the preservation of resources needed to sustain present and future generations. While the plaintiffs attempted to couch its complaint in environmental terms, it is clear that they are not concerned in those areas which the Congress has declared to be the policy and purpose of NEPA.

The previous paragraphs of this section are equally relevant to the issue of standing. To have standing, a plaintiff must demonstrate (a) injury in fact and (b) that the injury must be to an interest within the zone of interests protected by NEPA. Clearly, social and economic injuries do not satisfy the second requirement of standing.

The District Court found specifically that the plaintiffs would suffer no injury in fact by reason of the U.S.P.S. action (App. 141). The appellate court decision ignores, without even mentioning, these specific findings of the District Court. In its decision, the Court stated:

> It seems most unlikely that construction planned wholly without benefit of the thoughtful probing of environmental issues contemplated by NEPA will have achieved the best practical solution to minimizing *environmental damage at the construction site*, but perhaps some useful alternatives may still be available. (Emphasis supplied.) Slip Op. p. 5354

Until the decision, plaintiffs and defendants both had virtually agreed that there was no environmental damage at the construction site.

The complaint does not contain a single allegation of environmental damage at or near the construction site. At trial, plaintiffs did not offer any evidence of environmental damage in

Henrietta or at the construction site. In fact, in their brief in the Court of Appeals the plaintiffs have practically admitted this by concentrating on the damage to Rochester (Plaintiff's Brief, p. 23 to 27).

Since the construction of the HMF is in almost total compliance with every pertinent aspect of the regional development plans of the Planning Board (and this plaintiff does not allege otherwise) and is built totally within an industrial zone, this plaintiff cannot show any injury in fact.

The land used for the construction of the new building was zoned by the Town of Henrietta for the use planned by the Postal Service. The courts have held that building in accordance with local zoning regulations greatly reduces and even eliminates the "significant" impact of a federal action. *Maryland National Capital Park v. U.S.*, 487 F.2d 1029 (1973); *Hanly v. Kleindienst*, 471 F.2d 823, 833 (2nd Cir. 1972).

The Administrative Record

In a series of decisions: *Hanly v. Mitchell*, 460 F.2d 640 (2nd Cir. 1972) cert. den. 409 US 990; *Hanly v. Kleindienst*, 471 F.2d 823 (2nd Cir. 1972), cert. den. 412 US 908; and *Hanly v. Kleindienst*, 484 F.2d 448 (2nd Cir. 1973) cert. den. 416 US 936 (called respectively *Hanly I, II and III*) the Second Circuit set down guidelines for the role of the court in reviewing actions in light of NEPA.

Simply put, the courts determine whether the negative determination is based on a reviewable administrative record. The standard on which this is judged is the "arbitrary, capricious abuse of discretion" standard.

The District Court found a full and complete administrative record. (App. 139-140). It reached conclusions of law that the negative determination was based on the administrative record and that it was not arbitrary, capricious or an abuse of discretion. (App. 142-143).

The Circuit Court overlooked this aspect and went into the question of an impact statement with apparent disregard for the agency's *exclusive right* to make the initial determination. See *Hanly I* at 645; *Hanly II at 828; Harlem Valley Association v. Stafford*, 500 F.2d 328 at 337 (2nd Cir. 1974); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

Moreover, in the appellate decision at P. 5343, the Court stated:

> "... the Service has concluded in *reliance on the EIA* that the construction does not significantly affec[t] the quality of the human environment..." (emphasis supplied).

There can be no question that this statement is wrong.

The entire testimony on the part of the Postal Service in the court below was spent expounding on the full administrative record. The evidence is clear and uncontested that the reviewing official examined into and considered every aspect of the project. The District Court held that the administrative record consisted of at least 19 documents other than the EIA. (App. 139; Ex. 87-447).

Environmental Damage

The Court has overlooked not only the proof of the elimination of environmental harm at the construction site, but also the clear evidence that the U.S.P.S. considered and solved any problems concerning the transfer of employees.

In the opinion at P. 5344, the Court incorrectly indicated that the Postal Service had "wholly neglected" the environmental effects of the transfer in three areas: 1. Increased commuter traffic; 2. Loss of job opportunities to inner-city residents or moving out of the city to the suburbs; 3. The effect of moving out of Rochester on the downtown area.

As part of the administrative record, a series of documents were introduced which show that the Postal Service clearly

considered the effects on its employees, as well as the question of commuting. (Ex. 100-112; 250-283; 285-300; 301-302; App. 445-475; 135; 315-319). These reports covered every aspect of employee concerns. Notable in the study was a report of an agreement by the local transit company to provide bus service to Henrietta (see paragraph 5, page 11 of the EEO study at Ex. 285-300) All of this was supplemented and reinforced by oral testimony at the trial; none of which rebutted, contraverted, nor, in fact, even questioned.

As to the latter item, the Court below found that the appellant's claims of damage were speculative and will not occur. There was no evidence to support these claims. The Court of Appeals talks of harm to Rochester as suppositive. "One may suppose" that [abandonment] could contribute to blight, (Slip Op. P. 5344). The only testimony on the subject was by a planning official who indicated that it was just as likely that a change of use would result in an upgrading of the area (see Government Brief, P. 32, App. 315-319).

It hardly seems appropriate that a court should make a decision which can only result in increased cost to the public without evidence, and based only on supposition. This is especially true where the District Court made specific findings to the contrary.

Scope of Review

The appellate decision made no finding that the District Court was "clearly erroneous." In view of the fact that this court overlooked substantial portions of the record in its decision, the absence of applying Rule 52(a) of the F.R.C.P. is extremely important.

It is for the district court, not the circuit court, to judge factual issues. *Jackson v. Statler Foundation*, 496 F.2d 623, 626 (2nd Cir. 1974). As such, the duty of the Circuit Court is to review the evidence for sufficiency. *Stephan v. Marlin Firearms Company*, 353 F.2d 819, 824 (2nd Cir. 1965); *Hardware*

Mutual Casualty Company v. Jones, 363 F.2d 627, 632 (4th Cir. 1966). Moreover, it has been held that the circuit court, in determining whether the evidence supports the findings of fact, must view the evidence in the light most favorable to the prevailing party. *Montgomery Ward & Company v. Steele*, 352 F.2d 822, 826 (8th Cir. 1965).

Furthermore, the District Court findings should have been afforded great weight in the appellate court. Under Rule 52(a), the "clearly erroneous" provision bars the circuit court from setting aside fact findings unless they are clearly erroneous. *Lassiter v. Fleming*, 473 F.2d 1375 (2nd Cit. 1973); and *Luigi Serra, Inc. v. S.S. Francesco Co.*, 379 F.2d 540 (2nd Cir. 1967).

CONCLUSION

The petitioners request a rehearing *in banc* on the issues.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney
Attorney for Appellee

On the Brief:
Gerald J. Houlihan, *Assistant United States Attorney*
John T. Farrell, Esq., *United States Postal Service*
Michael A. McCord, Esq., *Department of Justice*

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
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The Daily Record

October 18, 1976

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County of Monroe) ss.:
City of Rochester)

Johnson D.Hay

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Appellee

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